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No. 90-1828

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

UNITED STATES OF AMERICA, Petitioner

v.

SAMMY G. DAILY and FREDERIK A. FIGGE.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether it was plain error, or error at all, for the district court not to instruct the jury that evidence of a defendants good character may give rise to a reasonable doubt as to guilt.

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STATEMENT

The respondents Sammy G. Daily and Frederik A. Figge, in addition to three others, were indicted by a federal grand jury on a 34-count indictment. After a three month trial and three days of jury deliberation, a jury in the United States District Court for the District of Kansas

acquitted the respondents on all counts except Count 30. The respondents were convicted of conspiring (under 18 U.S.C. 371) to commit wire fraud (18 U.S.C. 1343) and to make false statements to a federal agency (18 U.S.C. 1001). The United States Court of Appeals, Tenth Circuit reversed the respondents' convictions on the grounds the district court failed to instruct the jury regarding the respondents' good character evidence. On petition to the United States Supreme Court, the government claims the district court's failure to so instruct the jury is neither error nor plain error.

1. The government's 34-count indictment alleges active involvement by the respondents in a scheme to defraud the Coronado Federal Savings and Loan, the Indian Springs State Bank and numerous investors in a real estate partnership. The government's indictment consists mostly of substantive wire fraud counts (18 U.S.C.

1343). The indictment does not charge either respondent with a substantive count of making false statements under 18 U.S.C. 1001; however, respondent Daily was separately charged with making false statements to influence a federally insured bank (18 U.S.C. 1014 and 2).

The government's factual statement of the case in its petition for writ of certiorari continues the government's theme of active involvement by the respondents in a scheme to defraud others. The petition describes the respondents as "engaged," and that they "induced," "obtained," "told," "said," "represented," "knew," "arranged," "altered" and "created." However, critical to the respondents' appeals case, and to an appreciation of the appeals court decision, is the recognition that the respondents were acquitted on all the substantive counts they were charged with. Both respondents were found not guilty on the substantive wire fraud counts. The

respondents, as mentioned above, were not indicted on a substantive count of making false statements under 18 U.S.C. 1001. Indeed, while the government's petition alleges active involvement by the respondents in a scheme to defraud, the government admits in a footnote its failure to prove any of the substantive counts against the respondents: "[T]he jury's divided verdict may simply reflect the clear distinction in the weight of the evidence as to the conspiracy and the substantive counts. * * * The acquittal on the substantive counts may be explained by the fact that neither respondent was tied directly to the false representations that were made to induce the purchase of the certificates of deposit from [the financial institutions]." Petition for Writ of Certiorari 9, n.4.

2. The respondents were convicted of conspiracy under 18 U.S.C. 371. Conspiracy under the statute is defined as an agreement between two or more

persons to commit an offense against or defraud the United States, attended by an act by one or more of the conspirators to effect the object of the conspiracy. The actus reus of conspiracy, described by some as the essence of conspiracy, is the agreement to commit an illegal act. The mens rea of conspiracy has been described as having a dual nature. The basic intent to agree, which is necessary to establish the existence of the conspiracy, is the first mental state that must be proven. The second mental state that must be proven is the intent to effectuate the illegal object of the conspiracy.

Conspiracy has been called "the darling of the modern prosecutor's nursery, " Harrison v. United States, 7 F.2d 259 (2d Cir. 1925)(Learned Hand, J.) and not without reason. In the usual conspiracy prosecution, the government will call witnesses to testify as to the existence of an illicit agreement between the defendant and the

conspirator(s). Besides attacking the credibility of these witnesses, the accused is reduced to defending himself on the grounds he had no intent that the illegal purpose of the conspiracy would come about. As the prosecution can raise the defendant's proximity to the events of the conspiracy as circumstantial evidence of the point, it is not an uncommon strategic response for the defendant to introduce evidence of his own good character in order to raise a reasonable doubt as to whether he possessed the requisite mental state.

In the case sub judice, the respondents both presented, as described by the appeals court, "substantial" evidence of their good character. Petition for Writ of Certiorari, Appendix 51a; see id. at 40a-42a and 50a-52a for the Tenth Circuit's summary of the respondents' good character evidence. While the respondents both placed their character at issue and such evidence was important

to their defenses, the district court refused the respondents' request to instruct the jury as to the relevance and weight of the character evidence presented. On appeal to the Tenth Circuit, the Appeals court agreed with the respondents arguments that the district court's failure to instruct the jury on character evidence was trial error, that it was plain error and that the error denied them substantial rights.

ARGUMENT

The Solicitor General attacks the Tenth Circuit decision on grounds the failure to give a character instruction is neither error nor plain error. The respondents hold that the weight of practice and authority in this country supports the conclusion that the district court's failure to instruct the jury on the presented character evidence is obvious trial error. The special facts

of this case support the Tenth Circuit's finding that the error was sufficiently prejudicial to constitute plain error.

1. Clearly established by Federal Rules of Evidence Rule 404(a) is that evidence of a pertinent trait of character is admissible, when offered by the defendant, to prove action in conformity therewith. The respondents offered evidence of their honesty and law-abiding character traits-- certainly pertinent in a crimen falsi prosecution-- with the aim of convincing the jury to draw an inference that it is unlikely that they committed the charged offense.

Regarding the issue of entitlement to a jury instruction, this Court in the case of Michelson v. United States, 335 U.S. 469 (1948), in summarizing the use of character evidence, stated:

> This privilege [to introduce favorable character evidence] is sometimes valuable to the defendant for this Court has held that such testimony alone, in some circumstances, may be enough to raise a

> reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed. (Emphasis added).

Id. 335 U.S. at 476.

The Tenth Circuit's analysis of what constitutes a "proper" case held that a defendant is entitled to a character evidence jury instruction, like the one requested by the respondents, if two conditions are satisfied:

> First, defendants must in fact present evidence as to their good character, either through their own testimony or that of character witnesses. That is, they must affirmatively make their character an issue in the case. Second, their character evidence must concern traits that are relevant to the charged offense. (Cites omitted).

Petition for Writ of Certiorari, Appendix 39a. The Tenth Circuit found that both respondents had met the above two conditions and that the district court had committed error. The Court went on to find the error was prejudicial and therefore reversed the conviction. Id at 42a.

The Tenth Circuit's finding of trial error is consistent with a trial court's duty to instruct the jury on all the substantial features of the case arising out of the evidence. United States v. Jenkins, 701 F.2d 850 (10th Cir. 1983) and United States v. Zang, 703 F.2d 1186 (10th Cir. 1982). The government's expressed fear of unpredictability and constant retrial as a result of the Tenth Circuit's ruling seems totally unfounded. The Tenth Circuit's two-part test draws a relatively unambiguous, common sensical line.

In addition, the Tenth Circuit's finding of trial error is supported by the clear weight of legal authority. See United States v. Franchi-Forlando, 838 F.2d 585, 589 (1st Cir. 1988) (holding a trial court's failure to give a character evidence instruction is reversible error when the requested instruction is correct, not already covered and such failure impairs the defendant's ability to present his

defense); United States v. Cramer, 447 F.2d 210, 219 (2nd Cir. 1971); United States v. Quick, 128 F.2d 832, 836 (3d Cir. 1942) ("[w]e think that the learned trial court's failure to so instruct the jury was error, particularly in view of the defendant's express request which had pointed out the essential elements for charge with respect to character evidence"); United States v. Logan, 717 F.2d 84, 89 (3rd Cir. 1983) (holding the trial court's failure to give a character instruction was plain error); United States v. Darland, 626 F.2d 1235, 1237 (5th Cir. 1980) ("to deny introduction of such [character] evidence and to refuse an appropriate charge to the jury constitutes both plain error and an error affecting substantial right"); United States v. Hewitt, 634 F.2d 277, 278 (5th Cir. 1981) ("[i]n some circumstances, evidence of good character may itself create a reasonable doubt as to guilt, and the jury must be appropriately instructed"); United States v. Huddleston,

811 F.2d 974, 977 (6th Cir. 1987) (holding the district court was required to instruct the jury on character evidence); Hawley v. United States, 133 F.2d 966, 973 (10th Cir. 1943); United States v. Thomas, 676 F.2d 531, 535-37 n.3 (11th Cir. 1982); and United States v. Fox, 473 F.2d 131, 134-5 (D.C. Cir. 1972).

See also State v. Moreno, 391 S.E.2d 860, 862 (N.C.Ct.App. 1990) (holding a four-part test must be met before an instruction on character evidence is to be given); Duvall v. State, 387 S.E.2d 880, 882 (Ga. 1990) ("when a defendant requests a charge on good character and there is evidence to support the giving of the charge, the jury must be informed of the role the evidence of the defendant's good character may play in its deliberations"); Curry v. United States, 498 A.2d 534, 544 (D.C.App. 1985) ("[o]nce raised, the jury must be instructed that character evidence can raise a reasonable doubt about guilt"); State

v. Green, 294 S.E.2d 335 (S.C. 1982) ("[g]enerally, where requested and there is evidence of good character, a defendant is entitled to a [good character] instruction); and State v. Ramos, 435 A.2d 1122, 1125 (N.H. 1981) ("[it] was error for the court to fail to give a character evidence instruction").

The government cites two U.S. Appeals Court decisions it believes to create a conflict among the circuits: United States v. Hunt, 794 F.2d 1095 (5th Cir. 1986) and United States v. Knapp, 815 F.2d 1183 (8th Cir. 1987). The respondents believe these cases rest on findings that the district courts' failure to give specific character evidence instructions created no prejudice to the defendants and not on legal rulings that such failure does not constitute trial error.

While most of the appellate litigation on character evidence jury instructions involve the wording of such

instructions and not whether such an instruction is to be given at all, these cases are not totally irrelevant. The issue in many of the character evidence instruction cases concerns the "standing alone" jury instruction. Since the respondents' requested instruction is not one of the frowned upon "standing alone" instructions, these cases are not directly relevant. See Petition for Writ of Certiorari, Appendix 38a-39a for the respondents requested instruction. However, these cases do side with the respondents' position that some type of instruction is required.

2. The government contends, and the respondents do not challenge, that the respondents' counsel did not object at trial-- pursuant to Federal Rules of Criminal Procedure Rule 30-- to the failure of the district court to include the character evidence instruction. The respondents' counsel did request the instruction to be

given, along with fifty-one (51) other instructions.

Denying the requested jury instruction constitutes not only trial error but plain error under Rule 52(b). The district court's error is so readily apparent that "the trial judge and the prosecutor were derelict in countenancing it * * *." United States v. Frady, 456 U.S. 152, at 163 (1982).

The respondents also believe the district court's plain error, given the specific facts of this case, prejudiced their cases to the extent that substantial rights were affected. This Court in United States v. Young, 470 U.S. 1 (1985) stated that "[e]specially when addressing plain error, a reviewing court cannot properly evaluate a case except by viewing such a claim against the entire record." Id. 470 U.S. at 16. The Tenth Circuit, reviewing "the record from all four corners," found prejudice to the respondents' cases. The court noted the trial was a tough,

complex case and that the jury spent three days deliberating. The jury rendered a split verdict, acquitting the respondents on the numerous substantive charges against them. The jury convicted the respondents on the conspiracy charge only; and as set out above, the respondents' substantial character evidence went directly toward negating the element of intent in conspiracy. Upon these circumstances the Tenth Circuit found itself "constrained" to find plain error. Petition for Writ of Certiorari, Appendix 42a, 52a-53a.

The Solicitor General argues four U.S. Appeals Court decisions conflict with the Tenth Circuit's finding of plain error. As plain error findings are highly factual determinations, these cases can be distinguished upon the almost total lack of character evidence presented by each of the defendants'and the strong evidence of guilt in each case. United States v. Watson, 894 F.2d 1345, 1350 (D.C.

Cir. 1990); United States v. Previte, 648 F.2d 73, 83 (5th Cir. 1981); and United States v. Marquardt, 786 F.2d 771, 784 (7th Cir. 1986).

In a case much more akin to the case at present than the government will admit, the Third Circuit found plain error in a district court's failure to instruct a jury on the defendant's good character evidence. United States v. Logan, 717 F.2d 84 (1983). That court, in a case also involving conspiracy, stated that "[g]iven the unique nature of character evidence, the importance of appropriate instructions to provide jurors with adequate guidance for consideration of this testimony cannot be underestimated." The court based this statement in part on the reasoning of United States v. Frischling, 160 F.2d 370 (3rd Cir. 1947) which observed that a jury not properly instructed upon the relevance and weight of good character evidence "might well regard [such] evidence * * * as wholly

irrelevant to the specific issue of guilt committed to them and consequently give it no consideration whatever." Id. 717 F.2d at 88. The Court also noted that such evidence may be the only mode for a defendant to prove himself innocent of a crime involving dishonesty. Id. at 92.

This case, like Logan, constitutes a relatively rare instance of a district court committing a plain error that in the majority of cases does not rise to the level of prejudicing substantial rights. While the case presents an uncommon application of law to fact, nothing in the Tenth Circuit's decision merits special review by this Court.

CONCLUSION

Because the Tenth Circuit's findings of trial error, plain error and prejudice affecting substantial rights does not conflict with any of the applicable decisions of this Court or of the federal circuit courts, the Solicitor General's petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this ___ day of July, 1991, a true and correct copy of the above and foregoing Brief in Oppostion to Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Tentn Circuit was deposited in the United States mail, first class, postage prepaid, addressed to the following:

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